Dato Wong Gek Meng v Pathmanathan a/l Mylvaganam & Ors

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22-79 OF 1997
ABDUL MALIK ISHAK J
5 SEPTEMBER 1997

Civil Procedure *— Appeal — Notice of — Notice not in accordance with form — Whether appeal properly brought — Whether strict adherence to the rules required — Whether notice should be struck off — Rules of the High Court 1980 O 56 r 1(2) & Form 114*

The plaintiff filed three notices of appeal to the judge in chambers (encls 21, 46 and 49 — 'the enclosures') against the decision of the senior assistant registrar. The enclosures did not comply with the standard format as shown in Form 114 of the Rules of the High Court 1980 ('the RHC'). Counsel for the plaintiff admitted that he had changed the format in Form 114. He further admitted that the mistake was entirely his and that he was solely negligent. The plaintiff subsequently sought to withdraw the enclosures.

Held, striking out the enclosures:

Strict and dutiful adherence to forms and rules especially to the RHC will, in the long run, ensure an efficient bar and with it, a speedy and efficient administration of justice. Objections to technicalities must be viewed prima facie as non-compliance with the rules and the defaulters must pay dearly for it. It is obsolete now to adopt the old fashioned attitude that the rules of the RHC are intended to facilitate and not impede the administration of justice. On the contrary, the administration would be curtailed if the rules embodied in the RHC are not religiously followed. Lawyers cannot afford to adopt a lackadaisical attitude nor can they wring their hands and say that the courts would show mercy to them. As a code of procedure, the RHC should be strictly followed to the letter. Therefore, encls 46 and 49 — which were not in compliance with Form 114 of the RHC — were struck out with costs. In view of the dismissal of encl 49 — which meant that the writ of summons and the statement of claim had been struck off — encl 21 had become academic and was also struck off (see pp 566F–I and 567A–F); *Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd* [1991] SLR 122, *Leal v Dunlop Bio-Processes* [1984] 1 WLR 874 and *Ong & Co Pte Ltd v Carl YL Chow* [1987] 2 MLJ 430 followed.

Obiter:

(1) The obligations of counsel to his client must be viewed from two angles, firstly from equity and secondly from common law. At equity, the relationship between a solicitor and his client is entirely fiduciary and it carries with it the obligations on the solicitor's part to act not only with strict fairness but also with an

attitude of openness. At common law, a solicitor by his retainer must be skilful and careful. A solicitor must put at his client's disposal not only his skill but also his knowledge of the law as far as is relevant and germane. In the context of the present case, counsel's lackadaisical attitude in filing the enclosures without complying with Form 114 opened him in law to liability in tort for negligence. The magnitude of counsel's self-confessed negligence and his consequent liability may even extend to third persons (see pp 568H–I and 569A–B).

(2) A solicitor has a professional obligation to observe the standard of conduct required of members of his profession, particularly to conform to the Legal Profession Act 1976 and the Legal Profession (Practice and Etiquette) Rules 1978. Great care has to be exercised when a solicitor is dealing with the court. As an officer of the court, the solicitor must not do anything so as to deceive the court. The time has come for the court to adopt a stringent approach and castigate lawyers who by deception deceived the courts into believing that concessions made by lawyers to strike out the appeals would end the adjudication. Stringency is desirable to prevent breaches of the Legal Profession (Practice and Etiquette) Rules 1978 (see p 569D, G–H).

(3) The solicitor should fearlessly conduct the cause of action having both his duty to the court as well as his duty to his client in mind, but the solicitor must always be mindful of the paramountcy of his duty to the court (see p 570F–G).

[Bahasa Malaysia summary

Plaintif telah memfailkan tiga notis rayuan kepada hakim dalam kamar (lampiran 21, 46 dan 49 — 'lampiran-lampiran tersebut') terhadap keputusan penolong kanan pendaftar. Lampiran-lampiran tersebut tidak mematuhi format biasa seperti yang ditunjukkan dalam Borang 114 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Peguam plaintif mengakui bahawa beliau telah menukar format dalam Borang 114. Beliau seterusnya mengakui bahawa kesilapan adalah kesilapannya sendiri dan bahawa beliau sendiri yang cuai. Plaintif kemudiannya memohon supaya lampiran-lampiran tersebut ditarik balik.

Diputuskan, membatalkan lampiran-lampiran tersebut:

Pematuhan ketat dan bertanggungjawab borang dan kaedah terutamanya KMT akan, dalam jangka panjang, menjadi penghalang yang cekap dan dengannya, pentadbiran keadilan yang cepat dan cekap. Bantahan terhadap keteknikan mestilah dipandang prima facie sebagai ketidakpatuhan dengan kaedah-kaedah dan yang mengingkar mestilah menerima padah. Adalah kuno sekarang untuk menerimapakai sikap kolot bahawa kaedah-kaedah KMT bertujuan memudahkan dan bukan menghalang pentadbiran keadilan.

Sebaliknya, pentadbiran akan terbendung sekiranya kaedah-kaedah yang termaktub dalam KMT tidak dipatuhi seperti biasa. Peguam tidak mampu menerimapakai sikap acuh tak acuh dan mereka juga tidak boleh meramas tangan mereka dan mengatakan bahawa mahkamah akan menunjukkan belas kasihan terhadap mereka. Sebagai kanun prosedur, KMT harus dipatuhi dengan ketatnya. Maka, lampiran 46 dan 49 — yang tidak mematuhi Borang 114 KMT — dibatalkan dengan kos. Memandangkan pembatalan lampiran 49 — yang bermakna bahawa writ saman dan pernyataan tuntutan telah dibatalkan — lampiran 21 telah menjadi akademik dan juga dibatalkan (lihat ms 566F–I dan 567A–F); *Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd* [1991] SLR 122, *Leal v Dunlop Bio-Processes* [1984] 1 WLR 874 dan *Ong & Co Pte Ltd v Carl YL Chow* [1987] 2 MLJ 430 diikut.

Obiter:

(1) Kewajipan peguam kepada kliennya mestilah dipandang dari dua segi, pertama dari ekuiti dan kedua dari common law. Di ekuiti, hubungan di antara seorang peguamcara dan kliennya adalah fidusiari pada keseluruhannya dan membawa dengannya obligasi pada pihak peguamcara untuk bertindak bukan sahaja dengan keadilan yang ketat tetapi juga dengan sikap terbuka. Di common law, seorang peguamcara menerusi retainer mestilah mahir dan berhati-hati. Peguamcara mestilah memberikan kliennya bukan sahaja kepakarannya tetapi juga pengetahuan beliau mengenai undang-undang setakat mana adalah relevan dan berkaitan. Dalam konteks kes ini, sikap peguam acuh tak acuh dalam memfailkan lampiran-lampiran tersebut tanpa mematuhi Borang 114 mendedahkannya di sisi undang-undang kepada liabiliti dalam tort untuk kecuaian. Magnitud kecuaian peguam yang diakui dirinya dan tanggungan yang berikut mungkin boleh dilanjutkan kepada pihak ketiga (lihat ms 568H–I dan 569A–B).

(2) Seorang peguamcara mempunyai kewajipan profesional untuk mematuhi darjah kelakuan yang dikehendaki daripada ahli-ahli profesionnya, terutamanya untuk mengakuri Akta Profesion Undang-Undang 1976 dan Kaedah-Kaedah Profesion Undang-Undang (Amalan dan Etika) 1978. Sikap berjaga-jaga mestilah diamalkan ketika seorang peguamcara berurusan dengan mahkamah. Sebagai seorang pegawai mahkamah, peguamcara mestilah tidak melakukan apa-apa yang memperdaya mahkamah. Sudah tibanya masa untuk mahkamah menerimapakai pendekatan yang ketat dan menyelar peguam yang dengan penipuan memperdaya mahkamah untuk mempercayai bahawa konsesi yang dibuat oleh peguam-peguam untuk membatalkan rayuan akan mengakhiri penghukuman. Peraturan yang ketat adalah perlu bagi menghalang kemungkiran Kaedah-Kaedah Undang-Undang Profesion (Amalan dan Etika) 1978 (lihat ms 569D, G–H).

(3) Peguamcara haruslah mengendalikan kausa tindakan tanpa kegentaran dengan mengingati kedua-dua kewajipannya kepada mahkamah dan juga kepada kliennya, tetapi peguamcara mestilah sentiasa mengingati keutamaan kewajipan kepada mahkamah (lihat ms 570F–G).]

Notes

For cases on notice of appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 567–602 and 699.

Cases referred to

Bernstein & Anor v Jackson & Anor [1982] 1 WLR 1082 (refd)
Bird v Harris (1881) WN 5 (refd)
Burford; Burford v Clifford, Re [1932] 2 Ch 122 (refd)
Cheah Cheng Hoc v PP [1986] 1 MLJ 299 (refd)
Clark v Girdwood (1877–78) 7 Ch D 9 (refd)
Cockle v Whiting (1829) 1 Russ & M 43 (refd)
Cooke, Re (1889) 33 Sol Jo 397 (refd)
Dundas v Dutens (1790) 1 Ves 196 (refd)
Evans v Bartlam [1937] AC 473 (refd)
Hill, Re (1868) LR 3 QB 543 (refd)
Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd [1991] SLR 122 (folld)
Leal v Dunlop Bio-Processes International Ltd [1984] 1 WLR 874 (folld)
Midland Bank Trust Co Ltd & Anor v Hett, Stubbs and Kemp (a firm) [1979] 1 Ch 384; [1978] 3 All ER 571 (refd)
Myers v Elman [1940] AC 282 (refd)
Nocton v Lord Ashburton [1914] AC 932 (refd)
Ong & Co Pte Ltd v Carl YL Chow [1987] 2 MLJ 430 (folld)
Owen v Ord (1828) 3 C & P 349 (refd)
Parker, Re (1819) Buck 313 (refd)
Penn v Bristol & West Building Society [1995] The Times, 19 June (refd)
R v Fielding (1758) 2 Burr 654 (refd)
Rolfe v Rogers (1811) 4 Taunt 191 (refd)
Ross v Caunters [1980] 1 Ch 297; [1979] 3 All ER 580 (refd)
Saif Ali & Anor v Sydney Mitchell & Co (A firm) & Ors [1987] 3 All ER 1033; [1980] AC 198 (refd)
Spector v Ageda [1973] 1 Ch 30; [1971] 3 All ER 417 (refd)
Stephens v Hill (1842) 10 M & W 28 (refd)
Taylor v Lawrence (1892) 27 L Jo 422 (refd)
White & Anor v Jones & Anor [1995] 2 AC 207; [1995] 1 All ER 691 (refd)
Wiggins v Peppin (1839) 2 Beav 403 (refd)
Yee Chang & Co Ltd v NV Koninklijke Paketvaart Mattschappij [1958] MLJ 131 (refd)
Yukilon Manufacturing Sdn Bhd & Anor v Dato' Wong Gek Meng & Ors [1997] 2 MLJ 212; [1997] 2 CLJ 467 (refd)

Yukilon Manufacturing Sdn Bhd & Anor v Dato' Wong Gek Meng & Ors (No 2) [1998] 5 MLJ 1; [1997] 3 AMR 2641; [1997] 4 CLJ 209 (refd) A

Yukilon Manufacturing Sdn Bhd & Anor v Dato' Wong Gek Meng & Ors (No 3) [1997] 4 AMR 324; 3 CLJ Supp 279 (refd)

Legislation referred to B

Legal Profession Act 1976 s 77
Legal Profession (Practice and Etiquette) Rules 1978 rr 15, 17, 18
Rules of the High Court 1980 O 56 r 1(1), (2), Form 114

PM Mahalingam (PM Mahalingam & Co) for the plaintiff. C
Yusof Khan bin Ghows Khan (Gan & Lim) for the defendants.

Abdul Malik Ishak J: This case is an offshoot of three cases which have since been reported. The three cases were:

(1) *Yukilon Manufacturing Sdn Bhd & Anor v Dato' Wong Gek Meng & Ors* [1997] 2 MLJ 212; [1997] 2 CLJ 467; D

(2) *Yukilon Manufacturing Sdn Bhd & Anor v Dato' Wong Gek Meng & Ors (No 2)* [1998] 5 MLJ 1; [1997] 3 AMR 2641; [1997] 4 CLJ 209; and

(3) *Yukilon Manufacturing Sdn Bhd & Anor v Dato' Wong Gek Meng & Ors (No 3)* [1997] 4 AMR 324; 3 CLJ Supp 279. E

In this case, the plaintiff who was represented by Messrs PM Mahalingam & Co filed a writ of summons and a statement of claim against all the four defendants and sought, inter alia, damages in the sum of RM5m and other interrelated reliefs. The defendants in due course filed their statement of F defence as reflected in encl 38. On 29 August 1997, encls 21, 46 and 49 came up for hearings and these enclosures were in fact appeals by the plaintiff to the judge in chambers against the decisions of the senior assistant registrar ('the SAR') under O 56 r 1(1) of the Rules of the High Court 1980 ('the RHC'). G

Surprisingly, Mr Mahalingam, who acted for the plaintiff, in the course of a rather brief argument decided to withdraw encls 21, 46 and 49. It was an unprecedented move. Yet, Mr Mahalingam had the audacity to lodge an appeal against the striking out of encls 21 and 46 with costs, and the striking out of encl 49 without costs. H

Now, encl 21 is related to encl 5 which was an ex parte application in chambers by the defendants to extend time to file and serve the statement of defence until the defendants' application to strike out the writ of summons and the statement of claim had been decided by the court. Enclosure 5 was supported by an affidavit of Mr Gan Techiong that was affirmed on 2 May 1997. The SAR entertained encl 5, and being dissatisfied I the plaintiff filed a notice of appeal to the judge in chambers in encl 21.

Enclosure 46 is related to the summons-in-chambers filed by the plaintiff in encl 30 for leave to cross-examine the first, second, third and

fourth defendants' affidavits that were affirmed on 2 May 1997, 5 May 1997 and 24 April 1997. It seems that encl 30 was supported by the affidavit of Dato' Wong Gek Meng JP that was affirmed on 19 May 1997. The SAR refused to accede to encl 30 and this prompted the plaintiff to file a notice of appeal to the judge in chambers as reflected in encl 46.

Finally, encl 49 is related to encl 12 which was the defendants' application by way of a summons-in-chambers to strike out the writ of summons and the statement of claim under O 18 r 19(1)(a) or (b) or (c) of the RHC. Enclosure 12 was supported by:

(a) the joint affidavit of Mitsuhiko Sakamoto and Makoto Togase that was affirmed on 24 April 1997;

(b) the affidavit of M Pathmanathan that was affirmed on 2 May 1997; and

(c) the affidavit of Gan Techiong that was affirmed on 5 May 1997.

The SAR acceded to encl 12 and the plaintiff filed a notice of appeal to the judge-in-chambers as seen in encl 49.

It must be emphasized that encls 21, 46 and 49 have not been served on the defendants but Mr Yusof Khan, learned counsel for the defendants, was prepared to waive service of these enclosures. I shall now proceed to the heart of the matter.

Enclosure 46

Before proceeding to submit on this enclosure, Mr Mahalingam for the plaintiff orally applied to delete paras 1, 4(a) and (b). I allowed those deletions as prayed for orally. Mr Yusof Khan for the defendants then proceeded to submit. He submited on these lines:

(1) That paras 5, 6 and 7 of encl 46 have been deleted by Messrs PM Mahalingam & Co, the law firm that acted for the plaintiff. Indeed, this was a correct assertion. The deletions were made in black ink that were cut across paras 5, 6 and 7 of encl 46. An ugly sight.

(2) That para 3 of encl 46 cannot be made a subject of appeal as it was related to a submission made before the SAR. Moreover, the format adopted in encl 46 was contrary to Form 114 of the RHC. It is true that encl 46 did not comply with the standard format as shown in Form 114. In filing encl 46, Mr Mahalingam developed a format of his own. It was a complete change which was unknown to the law. It was argued by Mr Yusof Khan and rightly so that encl 46 was not before this court and it should be dismissed in limine. Mr Yusof Khan further argued that the defendants were embarrassed even though encl 46 was not served on them and prayed that encl 46 be dismissed with costs. Of great significance would be the arguments that the rules of the RHC should prima facie be obeyed and not flouted with impunity.

This is a classical case where the breach for non-compliance of the RHC was so fundamental that it went to the very root of the legal process. In *Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd* [1991] SLR 122, the Singapore Court of Appeal applied a stringent approach when it said:

> Notwithstanding the very wide powers given to the court to remedy non-compliance with the rules ... there may be failure or non-compliance with the rules which is so fundamental or serious that the court ought not to exercise its discretion under r 1 to remedy it.

In *Bernstein & Anor v Jackson & Anor* [1982] 1 WLR 1082, the English Court of Appeal held the view that the failure to renew a writ within the time specified in the rules was 'such a fundamental defect in the proceedings' that it was not a fit and proper case for the exercise of the court's discretion under O 2 r 1. Stephenson LJ in *Leal v Dunlop Bio-Processes International Ltd* [1984] 1 WLR 874 expressed his indignance when he said that the seriousness of the irregularity was the basis for not exercising the discretion to cure notwithstanding the fact that real prejudice may not be caused at all. In Stephenson LJ's words: '.... the court's restraining hand is an important restriction on the misuse of ... procedure'. More direct to the point would be the observations of Chan Sek Keong JC in *Ong & Co Pte Ltd v Carl YL Chow* [1987] 2 MLJ 430 where his Lordship said that the failure to comply with the provisions of the rules showed that (at p 432):

> ... the plaintiff has in fact disregarded the legal basis upon which the judicial power in Singapore may be exercised in Malaysia. That must render the purported service a nullity.

In my judgment, strict and dutiful adherence to forms and rules especially to the RHC will, in the long run, ensure an efficient bar and with it, hopefully, a speedy and efficient administration of justice. Objections to technicalities must be viewed prima facie as non-compliance with the rules and the defaulters must pay dearly for it. It is obsolete now to adopt the old-fashioned attitude that the rules of the RHC are intended to facilitate and not impede the administration of justice. On the contrary, the administration of justice would be curtailed if the rules embodied in the RHC are not religiously followed. With the advent of the Multimedia Super Corridor, lawyers cannot afford to adopt a lackadaisical attitude nor can they wring their hands and say that the courts would show mercy to them. As a code of procedure, the RHC should be strictly followed to the letter.

Mr Mahalingam for the plaintiff agreed totally with the sentiments expressed by Mr Yusof Khan. Mr PM Mahalingam unabashedly admitted the he had changed the format in Form 114 and he also admitted that he had made a mistake. Surprisingly, as a senior member of the Bar, Mr Mahalingam claimed to be solely negligent and sought to withdraw encl 46.

On these submissions, I struck out encl 46 with costs.

Enclosure 49

Mr Yusof Khan for the defendants raised the same objections as he did in relation to encl 46. He submitted that encl 49 should be struck off with costs as it contravened Form 114 of the RHC.

A perusal of encl 49 revealed several paragraphs that have been deleted by the stroke of a pen. Paragraphs 1, 2, 3, 4(a) and (b) of encl 49 have been deleted manually with black ink that was put across these paragraphs in childish fashion. So too was para 7(a) and (b) of encl 49. What was left were paras 5 and 6 of encl 49. Mr Yusof Khan rightly submitted that encl 49 should be withdrawn, failing which this court should strike it out.

Mr Mahalingam for the plaintiff agreed that encl 49 was not in substantial compliance with Form 114 of the RHC. He too agreed that the existing paras 5 and 6 of encl 49 were unclear and he proposed to withdraw encl 49 forthwith.

Without hesitation, I struck out encl 49 with costs.

Enclosure 21

Mr Yusof Khan rightly submitted that in view of the dismissal of encl 49 — which meant that the writ of summons and the statement of claim have been struck off — encl 21 had become academic. Mr Yusof Khan further submitted that Mr Mahalingam had intimated to him that he desired to withdraw encl 21. That being the case, Mr Yusof Khan was magnanimous enough not to ask for costs.

Mr Mahalingam agreed that encl 21 was defective and it should be set aside forthwith. With this concession, I struck off encl 21 without costs.

Solicitor's obligations towards his client

It is apparent that encls 46, 49 and 21 did not comply with O 56 r 1(2) of the RHC. Form 114 as set out in the RHC was not complied with by the plaintiff thereby attracting adverse comments by Mr Yusof Khan. Order 56 r 1(2) of the RHC states that:

> The appeal shall be brought by serving on every other party to the proceedings in which the judgment, order or decision was given or made a notice in Form 114 to attend before the Judge on a day specified in the notice.

For clarity, Form 114 of the RHC is reproduced hereinunder:

No 114
Notice of Appeal to Judge in Chambers

(Title as in action)

Take notice, that the abovenamed plaintiff (or defendant) intends to appeal against the decision of the Registrar given on the ..... day of ....., 19..... ordering (or refusing to order) (state in full the order appealed against).

Dated the ..... day of ....., 19..... .

.....
Solicitor for the .....

And further take notice, that you are required to attend before the Judge in Chambers on ..... the day of ....., 19..... at ..... m, on hearing of an application by the said plaintiff (or defendant), that (state the order sought to be obtained).

Dated the ..... day of ..... 19.....
(Seal)

.....
Registrar

To .....

Now, in changing the format as set out in Form 114 of the RHC, Mr Mahalingam admitted that the mistake was entirely his and that he was solely negligent. It was a perilous course for him to take but he took it within his stride. The House of Lords in *Saif Ali & Anor v Sydney Mitchell & Co (A firm) & Ors* [1987] 3 All ER 1033; [1980] AC 198 had occasion to consider the question of immunity from being sued enjoyed by a barrister or solicitor when engaged in the conduct of litigation. I need only to refer to the majority decision taken from the headnote ([1980] AC 198 at p 199), so far as is relevant to the present case, to illustrate the point:

> ... that in principle those who undertook to give skilled advice were under a duty to take reasonable care and skill, and that a barrister's immunity from suit for negligence in respect of his conduct of litigation on the ground of public policy was an exception and applied only in the area to which it extended; that the immunity was not confined to what was done in court but included some pretrial work, but that the protection should not be given any wider application than was absolutely necessary in the interests of the administration of justice and each piece of pre-trial work had to be tested against the one rule, namely, that the protection existed only where the particular work was so intimately connected with the conduct of the cause in court that it could fairly be said to be a preliminary decision affecting the way that cause was to be conducted when it came to a hearing ... .

On his own admission, Mr Mahalingam admitted that he was negligent in preparing Form 114 by not following closely to the format found in the RHC. The obligations of Mr Mahalingam towards his client, the plaintiff, must be viewed at two angles. Firstly, at equity. Secondly, at common law. In equity, the relationship between a solicitor and his client is entirely fiduciary (*Owen v Ord* (1828) 3 C & P 349; *Wiggins v Peppin* (1839) 2 Beav 403; *Bird v Harris* (1881) WN 5 (CA)) and it carries with it the obligations on the solicitor's part to act not only with strict fairness but also with an attitude of openness. Failure to adhere to this onerous obligation renders the solicitor liable to make compensation for any loss incurred by his client (*Nocton v Lord Ashburton* [1914] AC 932 (HL); *Re Burford, Burford v Clifford* [1932] 2 Ch 122 (CA)). On the other hand, at common law a solicitor by his retainer must be skilful and careful. Mr Mahalingam must put at the plainfiff's disposal not only his skill but also his knowledge of the

law as far as is relevant and germane (*Spector v Ageda* [1973] 1 Ch 30; [1971] 3 All ER 417). In the context of the present case, Mr Mahalingam's lackadaisical attitude in filing encls 46, 49 and 21 without complying with Form 114 opened him, in law, to liability in tort for negligence (*Midland Bank Trust Co Ltd & Anor v Hett, Stubbs and Kemp (a firm)* [1979] Ch 384; [1978] 3 All ER 571). The magnitude of Mr PM Mahalingam's self-confessed negligence and his consequent liability may even extend to third persons: *Ross v Caunters* [1980] 1 Ch 297; [1979] 3 All ER 580; *White & Anor v Jones & Anor* [1995] 2 AC 207; [1995] 1 All ER 691 (HL) and *Penn v Bristol & West Building Society* [1995] The Times, 19 June. The negligence of Mr Mahalingam is so gross that it is beyond description.

Solicitor's obligations towards the court

A solicitor has a professional obligation to observe the standard of conduct required of members of his profession, particularly to conform to the Legal Profession Act 1976 ('the Act') and the Legal Profession (Practice and Etiquette) Rules 1978 ('the Rules'). Under s 77 of the Act, the Bar Council may, with the approval of the Attorney General, make rules for regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors. For the purpose of this judgment, rr 15, 17 and 18 of the Rules should be referred as they give the pith and the depth of Mr Mahalingam's duty to this court. Thus, r 15 states that:

> An advocate and solicitor shall maintain a respectful attitude towards the Court.

Rule 17 states that:

> An advocate and solicitor shall not practice any deception on the Court.

Finally, r 18 states that:

> The conduct of an advocate and solicitor before the Court and in relation to other advocates and solicitors shall be characterised by candour, courtesy and fairness.

Great care has to be exercised when a solicitor is dealing with the court. As an officer of the court, the solicitor must not do anything so as to deceive the court. The time has come for the courts to adopt a stringent approach and castigate lawyers who by deception deceive the courts into believing that concessions made by the lawyers to strike out their appeals, like the present case, would end the adjudication, once and for all. Stringency is desirable to prevent breaches of the Rules. Section 94(3) of the Act defines 'misconduct' to mean conduct or omission to act in Malaysia or elsewhere by an advocate and solicitor in a professional capacity or otherwise which amounts to grave impropriety and includes:

> (d) breach of any rule of practice and etiquette of the profession made by the Bar Council under this Act or otherwise.

It is instructive to note that an allegation of conduct unbefitting a solicitor has been held to be substantiated against a solicitor where that solicitor wilfully misled the court: *Re Hill* (1868) LR 3 Q B 543; *Stephens v Hill*

(1842) 10 M & W 28; and *Re Cooke* (1889) 33 Sol Jo 397 (CA). Authorities are abound as to what would constitute misconduct. Misconduct in proceedings may extend to bringing vexatious and frivolous proceedings (*R v Fielding* (1758) 2 Burr 654 and *Cockle v Whiting* (1829) 1 Russ & M 43), or it may even extend to knowingly filing the action knowing that there is no reasonable cause of action or, for that matter, defending an action on the basis of flimsy defences having little or no chance of success (*Rolfe v Rogers* (1811) 4 Taunt 191 and *Taylor v Lawrence* (1892) 27 L Jo 422) or filing proceedings which are fraudulent (*Dundas v Dutens* (1790) 1 Ves 196) or, finally, filing what may be termed as instituting unnecessary proceedings (*Re Parker* (1819) Buck 313). But misconduct that will stir the court to life and that will receive the vehement disapproval of judges the world over would be deception. To practise deception on the court would be akin to 'ridiculing' the court. That would be misconduct so grave that words could not describe it.

Whyatt CJ in *Yee Chang & Co Ltd v NV Koninklijke Paketvaart Mattschappij* [1958] MLJ 131 at p 133 remarked that:

> ... a solicitor owes a duty to the court to conduct litigation with due propriety and to assist in promoting in his own sphere the cause of justice. If, therefore, a solicitor becomes aware in the course of proceedings that his client is obstructing the interests of justice, it is his duty to advise his client as to the conduct which he ought to follow and if the client still persists in his wrong conduct, he should decline to act for him further.

In *Cheah Cheng Hoc v PP* [1986] 1 MLJ 299, the concealment of an important document form the court was considered contemptuous conduct and that the solicitor's duty to the court was said to be paramount and outweighed the solicitor's duty to the client.

It is a correct statement of the law to say that the solicitor should fearlessly conduct the cause of action having both his duty to the court as well as his duty to his client in mind, but the solicitor must always be mindful of the paramountcy of his duty to the court (*Myers v Elman* [1940] AC 282 and *Clark v Girdwood* (1877–78) 7 Ch D 9).

Mr Mahalingam must have obtained instructions from his client, the plaintiff, when he withdrew encls 46, 49 and 21. What made Mr Mahalingam file an appeal against the striking out of these enclosures? Did his client instruct him to file that appeal? Was his client appraised of the facts that transpired before the court on 29 August 1997? Whatever the answers that may be advanced to these questions, they are mere conjectures. Of paramount importance would be the duty of Mr Mahalingam to this court and not to his client. It is instructive to note that an appeal to the judge in chambers under O 56 r 1(1) of the RHC is by way of an actual hearing of the application which led to the order under appeal and the judge will definitely treat the matter as though it came before him for the very first time. In the words of Lord Atkin in *Evans v Bartlam* [1937] AC 473 especially at p 478, the judge 'will of course give the weight it deserves to the previous decision of the Master; but he is in no way bound by it'. Substituting the word 'Master' with the word 'SAR', the judge will give

due weight to the decision of the SAR but the judge is in no way fettered by the previous exercise of the SAR's discretion on the matter in issue. In short, the parties in an appeal to the judge in chambers are free to ventilate once again before the judge. There was ample time between the disposal of the case before the SAR and the appeal to the judge in chambers for Mr Mahalingam to take instructions pertaining to encls 46, 49 and 21. Thus, on 29 August 1997 when Mr Mahalingam withdrew these enclosures, the irresistible inference was that he had obtained instructions from his client. This was my judgment and I so hold accordingly. If Mr Mahalingam did not obtain his client's instructions to withdraw these enclosures but instead took the gamble to withdraw at his own whim and fancy then he must be held accountable for deception under r 17 of the Rules. As an advocate and solicitor, Mr Mahalingam should maintain a 'respectful attitude towards' this court. With respect, he certainly failed to live up to expectations.

Order accordingly.

Reported by Eugene Lee Hong Whye